1986

The State of Utah v. Bruce Dallas Goodman: Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 860116
BRUCE DALLAS GOODMAN,	:	
Defendant-Appellant.	:	Priority No. 2

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF MURDER IN THE SECOND DEGREE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 75-5-203 (1978), IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR BEAVER COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS, JUDGE, PRESIDING.

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-v-	:	
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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant, Bruce Dallas Goodman, was charged with murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1978).

Defendant was convicted as charged in a bench trial held January 29-30, 1986, in the Fifth Judicial District Court, in and for Beaver County, State of Utah, the Honorable J. Harlan Burns, Judge, presiding. Defendant was sentenced by Judge Burns on January 30, 1986, to a term of five years to life in the Utah State Prison.

STATEMENT OF THE FACTS

On 30 November 1984 at about 9:30 a.m., the body of Sherry Ann Fales Williams was found near the Manderfield exit on Interstate 15 in Beaver County (T. 42-44). Except for her socks, Sherry Williams was naked from the waist down. Her hands were tied behind her back, and her ankles were tied together (T. 64-67). Her death had been occasioned by multiple blows to the head

with a blunt instrument--at least five blows had been inflicted upon the left side of the head, and at least three had been inflicted upon the right side (T. 30-31). From injuries to one of the victim's hands, medical experts surmised that she had been conscious and had attempted to ward off some of the initial blows (T. 31). In addition to lacerations and tears to the face and scalp of the victim (T. 24), the victim's anus had been torn by the forcible entry of an object (T. 35-36). Seminal fluid in the victim's vagina established that she had had sexual intercourse within the previous 24-36 hours (T. 99). Found near the body was a partially-smoked Benson & Hedges menthol cigarette, the type smoked by Sherry Williams (T. 67, 72, 117). The record established the following as to the circumstances of Sherry Williams' death:

Defendant met Sherry Williams during the latter part of October 1984, at a fair in Phoenix, Arizona (T. 343). Defendant had obtained a job at the fair selling hatpins and souvenirs for a man named Lloyd Howell, and the victim was working at the "dime pitch" (T. 344). Defendant and the victim began living together almost immediately upon meeting one another (T. 344). Shortly thereafter, the two of them went to Nevada. On 5 November 1984, they moved into the Little Hotel in Las Vegas (T. 118-20). Defendant obtained a job with Snyder and Sons, Inc., a hay and grain business owned by Mr. Frank Snyder (T. 125-26). During the next two weeks, Mr. Snyder allowed defendant to drive his 1983, white, Ford pickup. The pickup had "Snyder & Sons, Inc." painted on both sides as well as temporary signs on both sides advertising "Hay For Sale" (T. 122, 129).

On 19 November 1984, defendant asked Mr. Snyder's permission to borrow the Ford pickup in order to move his belongings to a new hotel (T. 131). Defendant never returned the truck to Mr. Snyder (T. 131), and later that day Mr. Snyder reported the truck stolen (T. 127). On that same day, Mr. Snyder found that several items were missing from his ranch; and at trial defendant admitted that he had stolen the pickup and a "chain saw, a drill, a jigsaw . . . a set of tires, Ford rims, 17-inch tires. . . ." (T. 346).

A few days later, defendant and Sherry Williams were seen in Beatty, Nevada, about 116 miles north of Las Vegas. Donald Dawson, who managed a Chevron station in Beatty, testified that defendant pulled into his service station, and Mr. Dawson identified the pickup belonging to Snyder and Sons as the vehicle defendant was driving (T. 149-50). Mr. Dawson saw tools, a chain saw, and one or two tires lying in the back of the truck, and defendant asked him if he wanted to buy the chain saw (T. 153). Mr. Dawson declined but noticed the "Hay For Sale" sign and said that he would be interested in buying some hay for his horses (T. 153). Mr. Dawson stated that defendant was accompanied by a woman and identified pictures of Sherry Williams as those of the woman who was with defendant (T. 154).[1]

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[1] Mr. Dawson was certain that he saw defendant "right close to" Thanksgiving Day. Mr. Dawson remembered that on that day he had divided the shift at work and had given his crew part of the day off (T. 156). The trial court took judicial notice that, in 1984, Thanksgiving Day was on 22 November (T. 170).

Defendant and the victim apparently spent a number of days in Stockton, California, visiting with Lloyd Howell, the man for whom he had worked at the fair in Arizona. By stipulation it was established that, from 20-25 November, Sherry Williams made a series of long-distance telephone calls from Stockton--to her mother in Maryland, and to her husband, Tom Williams, in Murray, Utah (T. 267-70). Defendant testified that in these telephone calls Sherry Williams made plans to return to her husband and that she and defendant had heated arguments over her plans to leave (T. 353-55).

Officer Gary Keuhl of the Las Vegas Police Department testified that near midnight on 29 November 1984, he found Frank Snyder's Ford pickup parked behind the Blue Diamond Union 76 Truck Stop in Las Vegas (T. 163). Both doors to the pickup were locked, and the keys were in the ignition (T. 164). Officer Keuhl stated that the truck had not been there when he patrolled the same area twenty-four hours earlier (T. 164). (The truck was returned to Mr. Snyder and, from his mileage records, Mr. Snyder ascertained that the pickup had been driven 800-1000 miles since it had been stolen on 19 November (T. 132)). Sharon Barnum, a cashier at the Blue Diamond Union 76 Truck Stop, testified that at about midnight of that night--29 November 1984--she saw the victim (who had been at the truck stop on previous occasions) arguing with a man. The man Ms. Barnum described matched defendant's description (T. 170-74).

A few hours later, defendant and Sherry Williams were seen at the Peppermill Casino in Mesquite, Nevada. Jeanie T.

White, who worked as a keno runner at the casino, testified that defendant and Ms. Williams were in the Peppermill for at least an hour and a half during the early morning hours of 30 November 1984. Defendant sat on a stool next to one of the slot machines, without playing, and the victim spent most of the time walking back and forth. Defendant and Sherry Williams began to argue with one another, and at one point they became so loud that Ms. White thought she might have to call a security guard to put an end to the disturbance (T. 195-97, 228). Sometime around 3:00-4:00 a.m., defendant and Sherry Williams left the Peppermill (T. 195, 215).

As noted above, Sherry Williams' bludgeoned body was found later that morning near the Manderfield exit in Beaver County (T. 42-44). Tests conducted by the State Crime Lab established that the semen which had recently been deposited in the victim's vagina had come from a male "secretor" with Type A blood (T. 88). Saliva tests conducted by the crime lab also established that the Benson & Hedges cigarette found near the victim's body had been smoked by a Type A secretor. Martha Kerr, from the State Crime Lab, testified that defendant was a Type A secretor and that about 32% of the population are Type A secretors (T. 85-88, 101). Sherry Williams' blood was type O (T. 84). Frank Snyder testified that the rope used to bind the victim's legs was of the same type and diameter as rope he kept in large quantities at the Snyder ranch (T. 102, 139-41).

At trial defendant waived his right to a jury (T. 2), and Judge J. Harlan Burns found defendant guilty of murder in the

second degree (T. 391). Defendant received a sentence of five years to life in the Utah State Prison (T. 394).

SUMMARY OF ARGUMENTS

There was adequate evidence presented from which the trial court could have concluded that Sherry Williams had been murdered and that defendant was the perpetrator.

Pretrial photo identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Therefore, defendant's argument that he was denied his constitutional right of due process is without merit.

The trial court neither denied defendant any constitutional right to speak in his own behalf, nor was he harmed by the court's refusing to hear from him after the verdict was rendered. Moreover, defendant waived his right to raise this issue by failing to make a proper objection at trial.

POINT I

THE EVIDENCE IN THIS CASE WAS SUFFICIENT TO CONVICT DEFENDANT.

Defendant's claim that there was not sufficient evidence presented at trial to convict him is without merit.

As pointed out in State v. Booker, 709 P.2d 342 (Utah 1985), where a defendant claims the evidence was insufficient to sustain his conviction, the standard of review is narrow.

> "[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction only when the evidence, so viewed, is sufficiently inconclusive or inherently improbably that reasonable minds must have entertained a

> reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, Utah, 659 P.2d 442, 444 (1983); accord, State v. McCardell, Utah, 652 P.2d 942, 945 (1982). In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ."
>
> State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord, State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

Id. at 345.

A. THE SUFFICIENCY OF THE EVIDENCE GENERALLY.

At trial, defendant claimed that he remained in Stockton, California, from 20 November until 3 December 1984, and that he neither killed Sherry Williams nor was anywhere near the scene of her death on 30 November 1984. There was abundant evidence from which the trial court could have concluded otherwise.

The eyewitness testimony establishing that defendant was with the victim during the night that she was murdered was persuasive. Jeanie White, the keno runner at the Peppermill in Mesquite, provided compelling testimony. For at least an hour and a half, between 2:00-4:00 a.m., defendant sat at a slot machine near where Ms. White was working (T. 194-96). In making her keno rounds, Ms. White walked directly past defendant every five to eight minutes (T. 197), and there were several reasons why he stood out in her mind. First, there was a loud argument between defendant and Sherry Williams which attracted Ms. White's attention. She kept an eye on them, thinking that she might have

to call a security guard to stop the disturbance (T. 196, 223). Second, Ms. White testified that customers at the Peppermill, even the truckers, tended to be washed and clean. Defendant had a short growth of beard, and he was noticeable because of his exceptional dirtiness (T. 198, 205). Third, Ms. White's attention was drawn to a levi vest--or jacket with the arms torn out--worn by defendant: there were a number of pins and buttons attached to it and, hanging from the jacket, was an unusual leather thong or "choker" which held a medallion of some sort (T. 198, 199). This jacket (with its sleeves torn out, buttons, leather choker, and medallion) was identified by Ms. White at trial and was shown to have belonged to defendant (State's Exhibit No. 28; T. 198-200). Furthermore, defendant stood out in Ms. White's mind, because he merely sat next to a slot machine, without playing it or any other of the games. Except for occasionally talking or arguing with the victim, defendant did nothing (T. 123). Ms. White added that the graveyard shift is normally "dead" and that there were very few people in the casino on the night in question (T. 194). She made a positive identification of defendant in court (T. 201) and, in rendering his verdict, Judge Burns specifically found that Ms. White's testimony was persuasive (T. 391).

The testimony of Sharon Barnum, the cashier at the Blue Diamond Truck Stop, was also significant. Ms. Barnum testified that Sherry Williams had been at the truck stop on previous occasions, and Ms. Barnum identified a photo of the victim as the person she saw at the truck stop at around midnight on 29

November 1984 (T. 173). The victim was arguing with a man, and while Ms. Barnum could not positively identify the man, her description fit defendant: she remembered that the man was wearing a levi vest and had tatoos on his arms (T. 174). At trial, defendant was asked to display his arms. At first, Ms. Barnum said she thought the man she saw had more tatoos, then she said that she could not be sure if the tatoos were different (T. 177). The record reflected, however, that defendant did indeed have tatoos on both arms and both hands (T. 177).

The testimony of other State witnesses further tended to establish that defendant was traveling with Sherry Williams to Utah, rather than being in Stockton as he claimed. When he took the witness stand, defendant admitted that he had stolen the Ford pickup, tools and other items from Mr. Snyder on 19 November 1984 (T. 346). Defendant claimed, however, that he immediately sold the stolen items in Las Vegas and that, still on 19 November 1984, he abandoned Frank Snyder's pickup at the Blue Diamond Truck Stop, and then with Sherry Williams began hitching rides to California (T. 346-47). However, Donald Dawson, the manager of the Chevron station in Beatty, Nevada, positively identified defendant as the man he saw driving the Snyder pickup on about 22 November 1984 (T 154). Mr. Dawson accurately described the pickup truck, with its "Snyder & Sons, Inc." and "Hay For Sale" signs (T. 156). He noticed tools, tires and a chain saw similar to those stolen from the Snyder ranch (T. 153). He recognized defendant's sleeveless levi jacket with its peculiar pins and buttons (T. 152). And Mr. Dawson recognized a photograph of

Sherry Williams as the woman who was accompanying defendant (T. 154). Officer Gary Keuhl testified that, on the night of 29 November 1984, he found Mr. Frank Snyder's pickup parked behind the Blue Diamond Truck Stop, and that the truck had not been there twenty-four hours earlier (T. 163-64). Mr. Snyder's records indicated that his pickup had been driven 800-1000 miles between the time it was stolen and the time it was recovered (T. 132). The combined testimony of Frank Snyder, Officer Gary Keuhl, Donald Dawson, and Sharon Barnum provided strong circumstantial evidence that defendant had not remained in Stockton, but had driven with the victim to Las Vegas in the Snyder truck on the night she was murdered.

The investigation at the scene of the murder produced further evidence of defendant's guilt. Defendant was a "Type A secretor" (as is only 32% of the population), and Sherry Williams had had recent sexual intercourse with a Type A secretor (T. 85-88, 101). A Benson and Hedges cigarette, the type smoked by the victim, was found near the body and had been smoked by a Type A secretor (T. 101). And the rope used to tie the victim's legs was the same type and diameter of rope that was kept in large quantities at the Snyder Ranch (T. 102, 139-41).

Defendant had a motive for killing Sherry Williams. He admitted that, against his wishes, she was planning to leave him and return to her husband. Defendant and the victim had had angry arguments over her plans to leave (T. 353-54). And defendant felt that Sherry Williams had been "using" him (T. 354).

There was evidence that defendant had engaged in violent acts on previous occasions (T. 343). Also, it appeared that even prior to the victim's decision to leave defendant, their relationship had been tempestuous: there had been heated altercations, and on one occasion the victim hurled a pair of scissors at defendant, and he threw her out of their hotel room (T. 364).

Defendant's defense of alibi was not persuasive. He and three members of the Lloyd Howell family stated that he was in Stockton, California, and could not have been near the scene of the murder. The trial court could easily have disbelieved defendant's own self-serving testimony. Defendant had a lengthy criminal record involving crimes of stealing and dishonesty (T. 343), he was shown to have lied to his employer Frank Snyder (T. 365), and he had committed a variety of dishonest acts during the time that he and Sherry Williams were together (see, e.g., T. 346, 361).

From the cold record now before this Court, it is less clear why the trial court refused to believe the testimony of Lloyd Howell, his son Kenneth, and Kenneth's wife Tina. There were, however, indications that people in the carnival business (as were the Howells) had a reputation for lying to protect each other (T. 300); that in August of 1985 at least one of the Howells could not remember the exact days that defendant had been in Stockton and, a fortiori, could not have recalled those dates at defendant's trial in January of 1986 (T. 304); and that the Howells became certain of relevant dates and events only after

they had met together and discussed the matter among themselves (T. 283).

After hearing the evidence, Judge Burns made the following findings:

> The Court finds no problems with the place [of death] being Beaver County, State of Utah, Manderfield exit.
>
> The Court finds, in tracing the thread of testimony, finds the testimony of Mr. Snyder, Mr. Dawson, the witness Barnum and the witness Keuhl, persuasive on the facts that they have testified, that may be somewhat in dispute with other witnesses.
>
> The Court finds that that pickup truck, beyond any doubt, was in Beatty, Nevada sometime between the 20th and the 29th of November, 1984.
>
> The Court further is persuaded that the witness Dawson in fact saw the accused in the company of the victim.
>
> The Court is persuaded that on November 29th, from the testimony of the witness Keuhl, the officer, that the truck was back at the Blue Diamond Truck Stop.
>
> I am persuaded that it wasn't there before. That is in direct contradiction of the testimony of the accused and also testimony and evidence of other witnesses.
>
> The Court is also persuaded that in the early-morning hours of November 30th, the defendant, and accused, was in the company of the deceased in Mesquite, Nevada.
>
> The Court is persuaded that the testimony of Jeanie White, including the trinkets on the jacket, that was observed by her on the person of the defendant, and the choker, that was part of that jacket, was the property of the victim, identified by the witness White.
>
> Now, I point those things out to you.
>
> The Court finds the defendant guilty as charged.

(T. 390-92).

Based upon the evidence before the trial court, these conclusions were proper.

B. THE EVIDENCE SUPPORTED THE COURT'S FINDING THAT SHERRY WILLIAMS HAD BEEN MURDERED.

In Point IV of his brief, defendant argues that the evidence was not adequate to establish that the killer of Sherry Williams acted with the state of mind needed to support a conviction of murder in the second degree. Defendant urges that the trial court could have concluded that the victim's death was brought about by behavior that was merely reckless and that he should only have been convicted of manslaughter. This argument is meritless.

First, the evidence was certainly sufficient to establish the mental element necessary to support a conviction of murder in the second degree. Utah Code Ann. § 76-5-203 (1978) states in relevant part:

> Murder in the second degree.--(1) Criminal homicide constitutes murder in the second degree if the actor: (a) Intentionally or knowingly causes the death of another; or . . . (c) Acting under circumstances evidencing depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another and thereby causes the death of another . . . .

The victim in the instant case was found with her hands and legs bound. Her head had been battered several times with a blunt object, and injuries to her hand indicated that she had attempted to ward of the blows. Under these circumstances, the trial court could properly have concluded that the perpetrator acted

intentionally, knowingly, or with depraved indifference.[2] Indeed, it would have been strange for the court to have concluded otherwise.

Moreover, defendant's argument--that "the evidence in this case supports the equally reasonable theory that the perpetrator of the attack upon Sherry Ann Fales Williams caused her death only recklessly which would constitute Manslaughter. . . ." (Brief for Appellant at 16)--avails him nothing. Defendant seems to have forgotten the Petree standard of appellate review, set forth in Point I of his brief. The issue is not whether a recklessness theory is "equally reasonable" to the theory of murder in the second degree, but whether the trial court must have concluded from the evidence that the perpetrator acted with mere recklessness and not intentionally, knowingly, or with depraved indifference. See State v. Petree, 659 P.2d at 444. See also State v. Booker, 709 P.2d at 345. Under the circumstances of this case, the argument that the trial court must have concluded that the perpetrator acted with mere recklessness is untenable.

And finally, defendant's argument should be rejected, because he waived his right to raise this issue on appeal by failing to address the matter at trial. At no time in the proceedings below did defendant claim that the evidence supported a charge of recklessness/manslaughter. Indeed this theory would

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[2] In rendering the verdict, Judge Burns declared: The Court, of course, finds no difficulty that the life of Sherry Ann Fales Williams was taken by means of murder. The Court finds the time was November 30, 1984. (T. 390).

have undermined his defense of alibi. In his opening statement at trial, defense counsel declared:

> MR. SHUMATE: Yes, Your Honor, May it please the Court and counsel: Your Honor, our evidence will basically show that there is not a dispute from the defense standpoint that Sherry Ann Fales Williams was tragically murdered at a location, that we believe, in a way, as best the evidence can show, north of Beaver at the Manderfield exit. We don't have any evidence to the contrary and we frankly believe she was in fact killed there. The dispute is as to who did it. (T. 10).

Defendant failed to raise the issue of manslaughter at trial and even conceded that there was no evidence to support such a claim. Accordingly, he may not now raise this issue on appeal. State v. Steggell, 660 P.2d 252, 254 (Utah 1983); State v. Pierren, 583 P.2d 69, 71 (Utah 1978).

Because there was sufficient evidence presented at trial to establish that Sherry Williams was murdered and that defendant was the perpetrator, defendant's argument should be rejected.

POINT II

PHOTOGRAPHS SHOWN TO WITNESS JEANIE WHITE DURING THE INVESTIGATORY STAGES OF THE PRESENT CASE DID NOT SO TAINT HER IDENTIFICATION TESTIMONY AS TO DEPRIVE DEFENDANT OF HIS RIGHT TO DUE PROCESS.

Defendant claims that, because witness Jeanie White was shown certain photographs prior to trial, her testimony at trial violated his constitutional right of due process. At trial, the State did not introduce any evidence of the pretrial photo identification. Therefore, the only issue here is whether the photographs so tainted Ms. White's testimony that, as a matter of

due process, she should not have been allowed to testify. There was no due process violation in the present case.

A. THE CONSTITUTIONAL STANDARD SET FORTH BY THE UNITED STATES SUPREME COURT.

In the leading case of Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court addressed the defendant's claim that the use of an unduly suggestive photo array prior to trial violated his right of due process. In an opinion by Justice Harlan, the Court acknowledged the possibility that showing photographs to witnesses might cause them to err in identifying criminal suspects. Id. at 384. Nevertheless, the Court recognized the validity of pretrial photographic identification stating that "this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." Id. The Court then set forth the constitutional standard by which photo identification procedures should be judged:

> We are unwilling to prohibit [the employment of photographic identification], either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The standard accords with our resolution of a similar issue in Stovall v. Denno, and with decisions of other courts on the question of identification by photograph.

Id. (footnote and citation omitted). Thus, in the present case, defendant's right to due process under the United States Constitution was violated only if the identification procedure was so suggestive that it gave rise to a "very substantial likelihood of irreparable misidentification." This did not occur in the pretrial proceedings of this case.

B. THE IDENTIFICATION PROCEDURES USED IN THE PRESENT CASE.

Defendant states in his brief that Ms. White was "shown a photo lineup consisting of six photographs. In that line up [sic] three were of Mr. Goodman or his composite drawing . . . ." (Brief for Appellant at 13). Defendant conveys the impression that Ms. White was shown six photographs in a single array and that three of those six involved defendant. This is a misrepresentation of the record. The uncontroverted testimony as to the photo identification procedure employed by the police is as follows:

First, there was an initial stage of the investigation in which Sheriff's Deputies from Beaver County made a series of trips to Nevada. They took with them a number of photographs including a photo of a composite drawing of the defendant. These pictures were shown to a number of individuals to ascertain whether they could recognize either defendant or the victim (Transcript of the Preliminary Hearing (hereinafter, "Prelim. Hrg.") at 220-23). In an initial contact with Ms. White, during January or February of 1985, Deputy Kelly Davis showed Ms. White the photograph of the composite drawing of defendant (Transcript of Suppression Hearing (hereinafter, "Suppress. Hrg.") at 18-

20).[3] No photo array, nor any other photo of defendant was shown Ms. White at this time.

About a month later, Deputy Davis and Deputy Raymond Goodwin presented a photo array to Ms. White (Suppress. Hrg. at 20-21). The array included four photographs, one being that of defendant. And Ms. White selected the photograph of defendant as the man she saw on the night in question (id. at 23, 58-59).[4] Both Deputy Goodwin and Jeanie White testified that she was not shown the photograph of the composite drawing on the same visit that the photo array was shown her. At the preliminary hearing, Deputy Goodwin stated, "At the time we done a lineup, the photo composite was not in there. There was Mr. Goodman's photograph in there and that's the one she picked out." (Prelim. Hrg. at 210). And the record of the suppression hearing reflects the following:

> Q. (By Mr. Shumate) Mrs. White, the photographs that you were shown, were they shown to you immediately after the composite was shown to you?
> A. No.
> Q. When were you shown the other photographs?
> A. It was on the next visit.
> Q. All right. So at the time, what we have called the second visit in January, February, you were shown only a composite at that time?
> A. Correct.

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[3] This photograph of the composite drawing was admitted into evidence at the Suppression Hearing, as Plaintiff's Exhibit No. 6, and is included in the appellate record.

[4] The photo array was admitted at the suppression hearing, as Plaintiff's Exhibit Nos. 2-5, and is also included in the appellate record. Exhibit No. 3 is the picture of defendant.

Q. And that was a composite shown to you by Deputy Kelly Davis, is that right?
A. Yes.

(Suppress. Hrg. at 20).

And finally, on the same visit that Ms. White was shown the photo array, the deputies showed Ms. White a Polaroid snapshot of defendant.[5] Ms. White affirmed that this was the man she had seen on the night the victim was murdered. It is plain from the record that the Polaroid snapshot was not presented to Ms. White as part of photo array and was shown her only after she had selected defendant's picture from the array (id. at 62-63).

C. THE LAW APPLIED TO THE FACTS OF THIS CASE.

Claims of undue suggestiveness in photo identification procedures "must be evaluated in light of the totality of surrounding circumstances." Simmons v. United States, 390 U.S. at 383 (citing Stovall v. Denno, 388 U.S. 293, 302 (1967)). In assessing the totality of the surrounding circumstances, the Supreme Court and other courts have considered a number of factors:

First, it is important to consider the witness's opportunity to observe the suspect. Logically, if the witness glimpsed the suspect only briefly or saw him under poor conditions, there is a greater risk of undue suggestiveness and misidentification than if the witness observed the suspect at length under favorable conditions. See id. at 383. Taking

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[5] This Poloroid snapshot was not introduced as evidence at the Suppression Hearing and is not included in the appellate record.

isolated statements out of context, defendant suggests that Ms. White's attention was never focused on the suspect and that she looked at him only briefly. However, the complete record in this case demonstrates that the circumstances were otherwise, that Ms. White observed defendant at length under exceptionally favorable circumstances. As noted above, defendant sat in the Peppermill for at least an hour and a half, and Ms. White walked past him on her keno rounds every five to eight minutes. At the suppression hearing, Ms. White testified that she walked past defendant 25-40 times (Suppress. Hrg. at 53). Ms. White estimated that she looked directly at defendant for a total of about 8-10 seconds (id. at 26). At the preliminary hearing, Ms. White stated that defendant and the victim "seemed to get into a domestic quarrel. And that's when I kept a good eye because I figured I would have to call security." (Prelim. Hrg. at 188). Defendant stood out because of his unusually dirty appearance. Defendant's vest with its buttons and "little doo jigs" attracted her attention (id. at 183). Ms. White noticed the leather "choker" hanging from defendant's jacket, and she stated she had never seen a choker

hanging like that from a vest before (Suppress. Hrg. at 52).[6] And Ms. White stated that while defendant was in the Peppermill the lighting was "very bright," because all the lights in the casino had been turned on for cleaning, which is done during the graveyard shift (id. at 35). Even if the identification procedures employed in this case had been improperly suggestive--which, as will be shown, they were not--this Court could conclude that, because Ms. White had such an excellent opportunity to observe defendant, there was little likelihood of misidentification and therefore no denial of due process. See Haberstroh v. Montanye, 362 F.Supp. 838, 840 (W.D.N.Y. 1973)(even where the photographic lineup is impermissibly suggestive, the criminal conviction will be upheld under the Simmons standard, if the witness had ample opportunity to observe the suspect and there is not a substantial likelihood of misidentification). Accord Hudson v. Blackburn, 601 F.2d 785, 788 (5th Cir. 1979); Mysholowsky v. New York, 535 F.2d 194, 197 (2d Cir. 1979).

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6 Defendant testified that the leather choker attached to his vest had belonged to Sherry Williams. She had worn it around her neck before giving it to him, in early November of 1984, as a token of fondness (T. 372).

In his brief defendant states, "She [Jeanie White] also claims to have identified on the levi vest a braided piece of leather referred to as a "choker". The State introduced at trial a photograph showing the deceased wearing the choker. However, the possible theory that the Defendant took the chocker [sic] from the deceased near the time of her death is inconsistent with the testimony of Jeannie White." (Brief for Appellant at 13).

Defendant seems confused as to the State's purpose in introducing evidence about the choker. There is no indication in the record that the State ever theorized that defendant took the choker from his victim near the time he killed her. Rather, the information was presented, because Jeanie White's ability to identify this peculiar piece of apparel on defendant's jacket was highly persuasive evidence that defendant was at the Peppermill with the victim on the night she was murdered.

A second important factor to be considered is whether the identification procedures employed by the police were unduly suggestive. Viewed as objectively as possible, the identification procedures employed in this case appear to have been less than perfect, but by no means so suggestive as to create a very substantial likelihood of irreparable misidentification. Addressing the photographs in the order that they were shown to Ms. White, nothing about the photo of the composite drawing seems to have been unduly suggestive. Such composites are routinely shown to potential witnesses during the early stages of a criminal investigation, and defendant neither argues nor is there any evidence that showing this composite to Jeanie White caused her to misidentify him in the photographic lineup or at trial.

The photographic lineup appears to have been fair. Ideally, the police might have broadened the array, using five or more photographs instead of just four. And two of the four photos happened to be of the same person, a Robert Hooper. Nevertheless, the array was not unduly suggestive. There is no indication that Ms. White knew that two of the photographs were of the same person. From all appearances, these were four different men with similar characteristics: they were male, Caucasian, had light brown hair, appeared to be about medium build, and three of the four (including defendant) had mustaches and light facial hair. The record does not disclose why the array was not broader nor why two pictures of Robert Hooper were employed. It should be noted, however, that the courts generally

afford the police a reasonable amount of latitude in photo-lineup situations, where the police appear to be doing the best they can with the resources they have. See, e.g., People v. Powell, 97 Mich. App. 287, 294 N.W.2d 262 (1980).

It is unclear from the record why Ms. White was shown the Polaroid snapshot of defendant after she had selected his picture from the photo array. Presumably this was done to give the deputies greater certainty that their investigation was focusing on the true criminal. Instead, defendant is provided fuel for his argument that the identification procedures were suggestive. Nonetheless, viewing the circumstances of this case in their entirety, it is extremely unlikely that showing this snapshot could have caused irreparable misidentification. As noted above, Ms. White had had an exceptionally good opportunity to observe defendant. She had already selected his photograph from the lineup. And in identifying defendant in court, she was "absolutely certain" that he was the man she had seen on the night in question (see infra this Brief at 25).[7]

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[7] Defendant suggests that more than one photograph of him was shown to Ms. White in a single photo array. As is shown above, this was not so. Significantly, however, based upon the totality of the circumstances involved, courts have frequently rejected arguments of undue suggestiveness, even where the witness had been shown more than one photograph of the defendant in the same photo array. See, e.g., United States v. Kaylor, 491 F.2d 1127, 1131 (2d Cir. 1973)(nine-picture photo array that included two of the defendant found not to be impermissibly suggestive); Commonwealth v. Loder, 4 Mass. App. 832, 351 N.E.2d 533, 534 (1976)(no due process violation where two snapshots of defendant accidentally included in array of six to ten photographs); State v. Thompson, 59 N.J. 396, 283 A.2d 513, 522 (1971)(conviction upheld where two pictures of the defendant were included in a seven-photo array).

Significantly, there is no evidence that the deputies themselves did anything to increase the likelihood of improper suggestiveness. Nothing suggests that the deputies told Ms. White of the details of the case, commented on the photos in the array, or presented the photos in a way that might have caused defendant's to stand out. Where, as here, the police have acted with due propriety, the courts have been especially reluctant to reverse a criminal conviction on grounds that a photo array was suggestive. See, e.g., People v. Lawrence, 4 Cal.3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), cert. denied, 407 U.S. 909 (1972).

It is also significant that defense counsel had ample opportunity to cross-examine Ms. White and thus expose possible weaknesses or suggestiveness in the identification. In Simmons v. United States, the Supreme Court noted:

> The danger that the use of [photographs] may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error.

390 U.S. at 384. The Supreme Court found it significant that, notwithstanding cross-examination, the witnesses did not display any doubt about their identifications of the defendant. Id. at 385. Similarly, in the present case, even after defense counsel had cross-examined Ms. White at the preliminary hearing and had called her to testify at the suppression hearing, she remained certain of her identification. The transcript of the suppression hearing reflects the following interrogation of Ms. White by defense counsel:

> Q. [By Mr. Shumate] But on that basis you state that Mr. Goodman, seated here next to me, is the same person that you saw there that night?
> A. Yes, sir.
> Q. There's no question in your mind about looking like a similar person?
> A. No, sir.
> Q. You're absolutely certain?
> A. Yes, sir.
> Q. Mrs. White, you understand that this is a case alleging capital homicide that carries a death penalty. Do you understand that?
> A. Yes, sir.

(Suppress. Hrg. at 38).

As Professors LaFave and Israel note, "the courts have generally been unsympathetic to defendants attacking the suggestiveness of photographic identification procedures." W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 7.4(e)(1984). This is probably in large measure so because the courts recognize that police identification procedures, while often less than perfect, are usually carried out in good faith and are rarely so suggestive that they cause misidentification. In Simmons v. United States, Justice Harlan concluded:

> Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal. We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

390 U.S. at 385-86 (footnote omitted). Here, as in Simmons, the identification procedure fell somewhat short of the ideal, but the possibility of suggestiveness was by no means substantial enough to constitute a violation of due process under the Federal

Constitution. This Court's analysis of this issue under the Utah Constitution should be no different.

POINT III

DEFENDANT WAS NOT DENIED ANY CONSTITUTIONAL RIGHT TO SPEAK IN HIS OWN BEHALF.

At the end of his trial, defendant personally asked that he be allowed to address the court. The court denied defendant's request, and defendant claims that his constitutional rights were thus violated. This argument has no merit.

It is useful to set forth the relevant portion of the record in its entirety. After defendant had taken the witness stand, after counsel had made their closing arguments, and after the court had rendered its verdict of guilty, the following discussion took place:

> BRUCE DALLAS GOODMAN: Your Honor, may I say something?
>
> THE COURT: I don't want to hear from you.
>
> BRUCE DALLAS GOODMAN: You don't even want to hear my statement and you are violating my constitutional rights. I want to be sentenced now.
>
> THE COURT: All right, Mr. Shumate, you may want to talk to your client.
>
> MR. SHUMATE: Your Honor, Mr. Goodman and I have discussed this matter in advance. He indicated to me that if the Court found him guilty, that he would request that the Court sentence him at that time, in order that it would enable an appeal to be taken directly.
>
> THE COURT: All right. Mr. Bruce Dallas Goodman, the Court having found you guilty as charged, second-degree murder, a first-degree felony, I advise you again that that offense is punishable by incarceration in the Utah State Prison for a period of time not less than five years but which may be for your natural life; in addition to that a fine up to $10,000 may be imposed, or both such fine and imprisonment. Are you aware of that?
>
> BRUCE DALLAS GOODMAN: I am aware of everything, yes.

THE COURT: Have you talked to your lawyer about that?

BRUCE DALLAS GOODMAN: Yes.

THE COURT: All right. The law also provides that you are entitled to an additional period of time from the finding of guilty of murder in the second degree, a first-degree felony, to have the Court pass judgment and impose sentence. That period of time, as provided by law, is not less than two days but within a reasonable time. Knowing you have the right to additional time, knowing this Court would grant you additional time, you want to waive time and proceed now, is that correct?

MR. SHUMATE: That is the position of my client, yes, sir.

THE COURT: Mr. Bruce Dallas Goodman, you concur?

BRUCE DALLAS GOODMAN: Yes.

THE COURT: All right, time waived. Now, the law allows you to call witnesses in mitigation or to make a statement in mitigation, either one or both. Do you desire to do either one?

MR. SHUMATE: No, your Honor.

THE COURT: No witnesses?

MR. SHUMATE: No, sir.

THE COURT: No statement?

MR. SHUMATE: No, sir.

THE COURT: Mr. Bruce Dallas Goodman, do you desire to make any statement?

BRUCE DALLAS GOODMAN: No. Proceed with the sentence, please.

THE COURT: All right. Anything in behalf of the State?

MR. CHRISTIANSEN: Nothing on sentencing, your Honor.

THE COURT: All right. No rebuttal?

MR. SHUMATE: No, sir.

THE COURT: All right, the matter having been submitted to the Court and the Court having determined you, Bruce Dallas Goodman, guilty of murder in the second degree, a first-degree felony, it is the sentence of this Court that -- first, I judge you guilty and I sentence you to the Utah State Prison for a period of time of not less than five years but which may be for the rest of your natural life. No fine.

(T. 392-94).

There are at least three reasons why this Court should reject defendant's argument that he was denied his constitutional rights:

First, there is no indication that any of defendant's constitutional rights were violated. UTAH CONST. Art. I, § 12 and UTAH CODE ANN. § 77-1-6(1)(a) (1982), cited by defendant, protect the accused's fundamental right to a fair trial. The accused is entitled to defend in person or by counsel, to testify in his own behalf, to confront the witnesses against him, and to compel the attendance of witnesses in his behalf. In the proceedings below, defendant was afforded all of these basic rights. He testified in his own behalf. Through counsel he made opening and closing statements to the court. He cross-examined the witnesses against him. And he compelled the attendance of witnesses from Utah, California and Florida to testify in his behalf. Nothing in the provisions cited by defendant suggests that the trial judge's authority to preserve the decorum of the proceeding is abridged, or that the accused may stand and address the court whenever he pleases.[8] Defendant had no so-called right to speak in his behalf that was violated in these proceedings.

Second, it is impossible to see how defendant could have been harmed by the actions in the court below. The record reflects that, after Judge Burns told defendant he did not want to hear from him, defendant exclaimed, "You don't even want to hear my statement and you are violating my constitutional rights. I want to be sentenced now." (T. 392). The court then spoke to

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[8] Standing alone, Judge Burns appears to have been curt with defendant in saying, "No. I don't want to hear from you." An examination of the entire record, however, will show that Judge Burns was cooperative with defendant and his counsel and gave them every opportunity to present an adequate defense.

defense counsel, counsel stated that he and defendant had discussed the matter and that defendant wished to waive the time for sentencing, and the court then proceeded to sentencing, giving defendant an opportunity to present evidence or to make a statement in mitigation. Thus, defendant was given exactly what he wanted. Judge Burns' telling defendant that he did not want to hear from him did not harm defendant and could not have affected the outcome of the case. For this reason defendant's argument should also be rejected. See State v. Tucker, 709 P.2d 313, 316 (Utah 1985) (this Court will not reverse a criminal conviction, unless the error "is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.").

And finally, defendant waived his right to raise this issue on appeal by failing to make a proper objection at trial. Defendant asked to be sentenced on the day of trial, and this was done. Defendant said nothing further, and from all appearances he was satisfied that his request had been granted. If defendant believed that he was being harmed by some lingering impropriety, he should have made a timely objection. The trial court could conveniently have corrected any defect at that point. Defendant's failure to object in the court below precludes his raising this issue on appeal. State v. Steggell, 660 P.2d 252, 254 (Utah 1983).

CONCLUSION

Based upon the foregoing arguments, defendant's conviction should be affirmed.

DATED this 22nd day of August, 1986.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to James L. Shumate, attorney for appellant, 110 North Main, Cedar City, Utah 84720, this 22nd day of August, 1986.

Earl F. Dorius by DBT